Constitutional court: mirrored by Ukrainian politics

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In early 2001, someone in the parliament made an original suggestion: to move «selected power institutions outside the capital of Ukraine…» The first institution to be moved was the Constitutional Court: it was suggested that being territorially distant it would be less sensitive to influence of the Kyiv-based power-broking center. According to the plan, the Constitutional Court would have been moved to Kharkiv, where the Academy of Law had already been based. Then Chief Justice of the Constitutional Court Victor Skomorokha reacted by telling the press angrily that «the Verkhovna Rada [the parliament] should be moved to Zhmerinka» (the name of a small town, commonly used to describe something hopelessly provincial). «There is a wonderful railway station there…» Skomoroshchenko went on (Fakty i kommentarii, January 24, 2001).

The exchange of politesses was in vain: the Constitutional Court did not move farther than a new building in Kyiv. The official opening of the new premises coincided with the fifth anniversary of the Constitutional Court and was probably the most noteworthy fact of the whole anniversary. However, seeming too low profile and unnoticeable, the Constitutional Court does play a substantial role in the Ukrainian political environment, notwithstanding the generally low respect for the rule of law in the emergent democracy.

Stages of development of that institution reflect not simply relevant «victories of democracy in Ukraine» but a variety of relations between the branches of power. The high-profile cases considered by the Constitutional Court often reflect deep contradictions in perspectives of different political personalities on what answers are more adequate and, therefore, more constitutional. In such cases the Constitutional Court is expected to act as a referee whose decision lifts the controversy.

However, various political forces have radically different opinions as to how well the judges manage to do their job. In the tense relations between the branches of power in Ukraine, primarily ion the traditional confrontation between the President and the parliament, the Constitutional Court is not just a buffer and a referee, but a party that is subjects to outside efforts to pull it into a political conflict and use it for manipulating the situation. As a result, the Constitutional Court finds itself in the capacity of an important player of the political tension. The trend could be observed, for example, in the debate about the April 2000 referendum, condemned as unconstitutional by some and advocated by other political forces. Then the confrontation between the president and the parliament deteriorated to the point when the dissolution of the parliament was discussed as a possibility. The decision of the Constitutional Court that the president's decree on the referendum was in tune with the Constitution added to the tension, particularly in the light of some provisions brought to the debate on march 29, 2000. On the other hand, the Court's judgement softened the blow to the president's ambitions, dealt by the rejection of unconstitutional of the first question proposed for the referendum (allowing the president to dissolve the parliament that received a no-confidence vote at a national referendum) and the sixth question that sought public agreement to the adoption of the Constitution by a national referendum. Commenting on the judgement, Oleksandr Yemets MP suggested an opinion that is still relevant today: «this was not the first time for the Constitutional Court to look for a political-legal compromise in a situation when relations between the branches of power deteriorate.» (Democratychna Ukraina, March 31, 2000).

Although in 1997 then-chairman of the Constitutional Court Ivan Tymchenko argued that «we are not a team of firefighters for putting down political fires» (Vseukrainskie Vedomosti, April 18, 1997), that is exactly what the performance of the Constitutional Court looks too often.

However, no matter how different political forces evaluate and criticize judgements of the Constitutional Court, its decisions are binding for all - which is a positive factor. One of the recent examples: the 2002 election campaign did not start as expected on October 12, 2001, for the Constitutional Court had judged that the election law, adopted in 1997, did not correspond fully with

provisions of the Constitution.

No matter how judgements of the Constitutional Court are interpreted by representatives of political forces, those judgements bring an element of order to the chaos of the political process, demonstrating the Fundamental Law, for all its shortcomings, is the Law. Therefore, the law is introduced to the sphere of political action: it is referred to, quoted and taken into account as the basis for decision-making. The Constitution becomes an integral element of the political discourse and the way to reaching consensus. From this point of view, even the inclusion of the Constitutional Court in settlement of political crisis situations has its positive factors. At least that inclusion demonstrates (even if declaratively) the efforts of the branches of power to seek settlement by legal means instead of resorting to the use of force.

Paradoxically, even attempts of various subjects of Ukrainian politics to influence the Constitutional Court (which is against the Constitution that stipulates that « Influencing judges in any form is prohibited» (Article 126) shows that the Constitutional Court plays a substantial role.

Shortly after the establishment of the Constitutional Court, its first head Ivan Tymchenko stressed that the court and its judges would not provide official interpretation of the Constitution but will give interpretation of the Fundamental Law in any particular case based on the appeals (Zerkalo Nedeli, January 4, 1997). The fact, the opinion itself contradicted the Constitution that defined the powers of the Constitutional Court as those of «the only body of constitutional jurisdiction in Ukraine. The Constitutional Court of Ukraine deals with issues of compliance of laws and other legal acts to the Constitution of Ukraine, and gives official interpretation of the Constitution of Ukraine and its laws.» (Article 147).

Different political forces have different opinions about the «official interpretation» of the Constitution by the Constitutional Court. For instance, in June 2000 the faction of the Socialist party issued a statement «On the Role of the Constitutional Court in Attack on Democracy, parliamentarism in Ukraine», arguing that «within the period from 1997 to May 2000, the Constitutional Court of Ukraine had adopted 10 special decisions linked to limiting the scope of powers of members of the parliament of Ukraine. That comprises almost 22 percent of the total number of issues considered [by the Constitutional Court]… Members of the Constitutional Court, having shielded themselves from the people with state-owned dachas, cars and security guards, forgot their constitutional duty to serve only the people of Ukraine…» (Holos Ukrainy, June 15, 2000).

Among the «wrong» judgements made by the Constitutional Court, its critics listed the judgement of April 13, 2000, on the appeal of the Office of Attorney General requesting official interpretation of the right of an MP to make a formal request to the procurature. Then the Constitutional Court judged that an MP had no right to petition the procurature and prosecutors with demands, proposals or recommendations concerning specific cases in support of the state prosecution at court, representation of an individual or the state at court in cases specified by the law, and supervision of the compliance with the law by bodies that are engaged in operative investigation, interrogation and pre-trial investigation. The Verkhovna Rada, pursuant to the judgement of the Constitutional Court, did not have the right of direct control over activities of the procurature. The Constitutional Court judged that any interference with activities of the procurature was illegal and unconstitutional.

Another reason for criticism by the parliament was the judgement of the Constitutional Court of May 18, 2000 that recognized some provisions of the law «On the Status of a People's Deputy of Ukraine» as contradicting the Constitution. Specifically, the matter was giving an MP the right to exercise control over review of complaints, proposals and appeals to state agencies, associations of citizens, enterprises and organizations regardless of their form of ownership. Furthermore, the Constitutional Court judged as unconstitutional Article 30 of the law that had given MPs the right to preferential treatment in access to state-owned print and electronic media on issues related to his or her professional activity as an MP. The appeal about the mismatch between those provisions and the Constitution was submitted to the Constitutional Court by the president of Ukraine. Hence, the voters' chances to find out what was done by MPs were reduced. Such judgements made by the Constitutional Court allowed critics to refer to growing influence on the Constitutional Court by the presidential administration.

The present-day head of the Constitutional Court Victor Skomoroshchenko, elected on October 18, 1999, dismisses all accusations of bias: «the law-based position of the court, obviously, does not suit

everyone. There have been noticeable attempts to turn its activity from the way of the law to the field of politics, to drag [the Constitutional Court] into settlement of political conflicts in favor of a certain conflicting party» (Uriadovyi Kurrier, October 18, 2001). Hence, it is important to ensure that the Constitutional Court does not become hostage of the «certain conflicting parties» - otherwise the whole sense of that institution will be lost. A noteworthy demonstration of the Constitutional Court's efforts to avoid «sharp edges» of the Ukrainian political environment is the case started on May 11, 2000 following the appeal of 57 and 69 MPs about judging the acts adopted at the «outside» sessions of the parliament, in the Ukrainsky Dim, on January 21 - February 1, 2000. The left factions, moved from control of the parliament, did not accept the decisions of the «velvet revolution». In July 2000 the Constitutional Court terminated the case, as it was regarded as dominated primarily by political issues. Victor Skomorokha argued that the Constitutional Court was not in charge of cases on political processes in the parliament or any other political entities. «Judges should not engage in political activity,» he stressed and added that the Constitutional Court only served as a referee in settling the legal side of a political dispute and «made a stabilizing judgement for the society» (Molod Ukrainy, July 6, 2000).

The genesis of the Constitutional Court reflected general stages of Ukraine's state-building and mirrored political contradictions of the process. General authorities and structure of the Constitutional Court were first determined by the parliament in June 1992 and reflected in the Constitutional Agreement. Professor L. Yuzkov was the first chairman of the Constitutional Court, but the entity was formed with great difficulty due to the confrontation between the branches of power. In 1994, the establishment of the Constitutional Court was hindered by the disagreement between the constitution of that time and the legislation. Then Minister of Justice Vasyl Onopenko argued that «the Constitutional Court of Ukraine should have been established several years ago, but not the one that was proposed» (UNIAN, October 20, 1994). Then speaker of the parliament Oleksandr Moroz argued that the Constitutional Court would find it difficult «to speak on behalf of the Constitution, knowing that the norms in operation are not exactly the norms included in the Constitutional Agreement» (UNIAN, July 9, 1995).

The first stage of the development of the Constitutional Court was spent not as much in discussion of the candidates nominated to be considered by the parliament, but in discussion whether or not the Constitutional Court was needed for the period of the Constitutional Agreement. As a result, the Constitutional Court was not formed in 1995. Moreover, the whole idea of having a Constitutional Court was questioned. For instance, Mykhailo Syrota MP believed that Ukraine should follow the way of traditional democracies, where there is a Supreme Court - a fully independent branch of power, and its «tributary», the Constitutional Chamber, designed to deal with constitutional issues (Holos Ukrainy, October 19, 1995). However, the discussions stopped once the new Constitution was approved.

The adoption of the Fundamental Law enhanced the important provision of Article 6: «The state power in Ukraine is exercised based on the division into the legislature, the executive and the judiciary». Article 124 stipulated that «Justice in Ukraine is done by the courts only. Justice is performed by the Constitutional Court and courts of general jurisdiction». In accordance with the Constitution of Ukraine, one third of the Constitutional Court is nominated by the president, one third - by the speaker of the parliament, and yet another one third by the National Convention of Judges. Therefore, each of the branches of power takes part in forming the Constitutional Court. The entity is funded with the taxpayer money.

On October 16, 1996, President of Ukraine Leonid Kuchma signed a law «On the Constitutional Court of Ukraine» that defined the Constitutional Court as the only body of constitutional jurisdiction in Ukraine. The law also specified tasks of the Constitutional Court, the legal framework for its operation and key principles of its activities, as well as the composition of the Constitutional Court and the order of appointing the judges.

The Constitutional Court was appointed almost four month after the adoption of the Constitution, on October 18, 1996. 16 members of the Constitutional Court made an oath «to perform the high duty of judges of the Constitutional Court honestly and diligently», and one of the judges, M. Kostytsky, started with himself by announcing his decision to forgo his seat in the parliament. The first session of the Constitutional Court elected its first chairman, former director of the legal department of the presidential administration Dr. Ivan Tymchenko, 57.

Appeals to the Constitutional Court could be made from January 1, 1997. The first case - the issue of MPs who combined their service in the parliament with other jobs - was considered by the session of the Constitutional Court in the spring of 1997. Then there were about 100 «part-time» MPs in the parliament. Seeking to keep their two (or even three) jobs, they argued that the law could not be retroactive, for they had been elected before the adoption of the Constitution in 1996, which had introduced (by Article 76) a professional full-time parliament. On May 15, the Constitutional Court adopted a «Solomon» decision: MPs could combine their work in the parliament with any other job if they took it before June 8, 1995 (the day when the Constitutional Agreement, first introducing the requirement of a professional parliament, had been signed). Controversially, the Constitutional Court also allowed MPs elected before the adoption of the Constitution not to take the formal oath (all in all, there were 63 such MPs in the parliament!).

The Constitutional Court played a certain role in the 1997-1998 parliamentary election campaign. In 1997, the Constitutional Court started with an appeal submitted by a group of MPs (V. Nosov, V. Hetman) about some «unconstitutional» provisions of the new election law. Noteworthy, should the law have been judged unconstitutional (which the Central Election Commission had already started working in October 1997), there was a strong chance that the election campaign would be disrupted or the new parliament would be judged as illegitimate. The verdict of the Constitutional Court was mandatory for confirming legitimacy of the would-be parliament and the election procedure. However, the judgement was postponed till 1998, to the happiness of candidates running for seats in majoritarian constituencies and opponents of the elections. In the context of the campaign that was gaining momentum, the Constitutional Court issued an important judgement on November 6, 1997. It referred to paragraph 4 of Article 23 of the law «On Information» that prohibited collecting, storing, using and disseminating information about a person without that person's prior agreement. «Confidential» data included information about education, marital status, religion, health condition, date and place of birth and ownership of property. Obviously, the judgement infringed on the rights of journalists to perform their professional duties by collecting and disseminating information. The rights of voters to know as much as possible about those whom they were going to elect was also undermined.

Given the experience of the previous election campaign, the forthcoming elections are also likely to bring appeals to the Constitutional Court to question legitimacy of specific provisions of the Ukrainian election legislation. The political life is likely to bring new interesting themes related to the fact that not all of the political forces are entirely happy with the election law. Therefore, the Constitutional Court is likely to be busy interpreting specific provisions. While particular outcomes of such interpretations will differ on the case-by-case basis, the critical point is to ensure that the Constitutional Court does not become hostage to political confrontation.